HASSAN HUSSIN v. TENGKU AZHAR ADIB T YUSUF

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
IDRUS HARUN JCA
ZAMANI A RAHIM JCA
[CIVIL APPEAL NO: D-02(NCVC)(W)-55-01-2015]
20 MAY 2016

LAND LAW: *Sale of land – Bare trust – Land purchased by buyer not transferred by vendor immediately – Land subjected to restriction prohibiting transfer of ownership for period of ten years from date land title was issued – Vendor to complete transfer of land to buyer after expiry of restriction – Original qualified title of land in buyer's possession – Whether vendor bare trustee*

LAND LAW: *Sale of land – Forgery – Transfer of land – Allegations by vendor that power of attorney and Form 14A executed in favour of buyer forged – Whether allegations proved*

The appellant had purchased a land belonging to the respondent. The land was not transferred immediately as it was subjected to a restriction prohibiting any transfer of the land's ownership for a period of ten years from the date the land title was issued. The parties agreed that when the said period of restriction expired and a final title was issued, the respondent would complete the transfer of land to the appellant. The respondent (i) executed a power of attorney ('POA') in favour of the appellant; (ii) executed Form 14A for the transfer of the land to the appellant; and (iii) surrendered the original qualified title to the appellant. In 2011, the appellant tried to trace the respondent to complete the transfer of the land but to no avail and was informed by the Land Office that the final title had already been issued in 2008 and was collected by the respondent. The appellant lodged a private caveat on the register document of title of the land. However, he was served with a notice for removal of the caveat applied by the respondent as the latter intended to transfer the land to another person. The appellant filed a claim at the High Court seeking, *inter alia*, a declaration that the land was sold by the respondent to the appellant and that the same was held by the respondent as a bare trustee. In defence, the respondent argued that, *inter alia*, (i) he did not know the appellant; (ii) the name appearing on Form 14A was not his; and (iii) the signature on the POA was forged. The High Court dismissed the appellant's claim based on the findings that the appellant was not a *bona fide* purchaser and that he had conspired with a Senior Land Administrator ('PW1') and one Che Mat to purchase the land. Hence, the present appeal.

A **Held (allowing appeal with costs; setting aside order of High Court)**
Per Idrus Harun JCA delivering the judgment of the court:

(1) The finding that the appellant was not a *bona fide* purchaser and that he had conspired with PW1 and Che Mat to purchase the land was perverse as it was not based on the respondent's pleaded case. Nowhere in the
B respondent's statement of defence was this issue raised and neither was Che Mat mentioned. The High Court Judge overlooked the fact that the respondent's defence was one of a mere denial. (paras 10 & 12)

(2) The respondent failed to prove his claim that he never sold the land to the appellant and that he did not know the appellant while in actual fact
C there was evidence to show that he executed the POA and Form 14A before PW1. The respondent did not adduce any evidence to prove that the signature and thumbprint on the POA and Form 14A respectively were forged. The evidence of the appellant, supported by PW1's evidence, served as clear proof that the respondent signed these
D documents at the Land Office. The respondent's evidence on the alleged forgery was devoid of any merits and must therefore be rejected. (paras 12, 19 & 20)

(3) Even though the name 'Adib' was omitted from the respondent's full name, the omission was not fatal as the simple and naked facts relating
E to the identity card number, the address and the signature stated in the POA and Form 14A clearly showed that the same indeed belonged to the respondent. The name appearing in these documents belonged to the respondent and was in fact executed by him. (para 31)

F **(4)** The sale and purchase transaction between the appellant and the respondent constituted a valid binding contract. There was clear evidence that the respondent was paid. From 2001 when the land was sold to the appellant, the respondent held the land as a bare trustee while waiting for the title to be transferred to the appellant when the restriction
G ceased to have effect. A bare trustee has no obligation except to hand over the trust property to the person entitled to it. (paras 33 & 34)

Bahasa Malaysia *Headnotes*

Perayu telah membeli sebidang tanah milik responden. Tanah tersebut tidak dipindah milik serta merta kerana tertakluk pada sekatan yang melarang
H pindah hak milik tanah bagi tempoh sepuluh tahun dari tarikh hak milik tanah dikeluarkan. Pihak-pihak bersetuju bahawa apabila tempoh sekatan tersebut tamat dan hak milik tetap dikeluarkan, responden akan menyempurnakan pindah milik tanah kepada perayu. Responden (i) memeterai satu surat kuasa wakil ('POA') berpihak pada perayu;
I (ii) melaksanakan Borang 14A bagi pindah milik tanah kepada perayu; dan (iii) menyerahkan hak milik sementara yang asal kepada perayu. Pada 2011,

perayu cuba mengesan responden untuk menyempurnakan pindah milik tanah tetapi gagal malah dimaklumkan oleh Pejabat Tanah bahawa hak milik tetap telah dikeluarkan pada 2008 dan diambil oleh responden. Perayu memasukkan kaveat persendirian atas dokumen hak milik tanah tersebut. Walau bagaimanapun, dia diberi notis untuk menyingkirkan kaveat, dipohon oleh responden yang ingin memindah milik tanah tersebut kepada orang lain. Perayu memfailkan tuntutan di Mahkamah Tinggi, memohon, antara lain, satu perisytiharan bahawa tanah tersebut dijual oleh responden kepada perayu dan dipegang oleh responden sebagai pemegang amanah terus. Dalam pembelaannya, responden menghujahkan, antara lain, (i) dia tidak mengenali perayu; (ii) nama dalam Borang 14A bukan namanya; dan (iii) tanda tangan pada POA adalah palsu. Mahkamah Tinggi menolak tuntutan perayu berdasarkan dapatan bahawa perayu bukan pembeli *bona fide* dan bahawa dia telah berkomplot dengan seorang Pentadbir Tanah Kanan ('PW1') dan seorang yang bernama Che Mat untuk membeli tanah. Oleh itu, timbul rayuan ini.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Dapatan bahawa perayu bukan pembeli *bona fide* dan bahawa dia berkomplot dengan PW1 dan Che Mat untuk membeli tanah tersebut adalah tidak munasabah kerana tidak berasaskan kes yang diplidkan oleh responden. Isu ini tidak dibangkitkan dan Che Mat tidak disebut langsung dalam penyata pembelaan responden. Hakim Mahkamah Tinggi terlepas pandang fakta bahawa pembelaan responden satu penafian semata-mata.

(2) Responden gagal membuktikan tuntutannya bahawa dia tidak pernah menjual tanah tersebut kepada perayu dan bahawa dia tidak mengenali perayu sedangkan wujud keterangan yang menunjukkan dia memeterai POA dan Borang 14A di hadapan PW1. Responden tidak mengemukakan apa-apa keterangan untuk membuktikan bahawa tanda tangan dan cap jari pada POA dan Borang 14A telah dipalsukan. Keterangan perayu, disokong oleh keterangan PW1, adalah bukti jelas bahawa responden menandatangani dokumen-dokumen ini di Pejabat Tanah. Keterangan responden tentang dakwaan pemalsuan tidak bermerit dan dengan itu, mesti ditolak.

(3) Walaupun nama 'Adib' tidak disertakan dalam nama penuh responden, ketinggalan tersebut tidak menjejaskan kerana fakta yang mudah dan jelas seperti kad pengenalan, alamat dan tanda tangan pada POA dan Borang 14A jelas menunjukkan kesemuanya memang milik responden. Nama yang tertera pada dokumen-dokumen ini milik responden dan sememangnya dilaksanakan olehnya.

(4) Transaksi jual beli antara perayu dan responden membentuk satu kontrak mengikat. Terdapat keterangan jelas bahawa responden dibayar. Dari 2001 semasa tanah tersebut dijual kepada perayu, responden memegang tanah tersebut sebagai pemegang amanah terus sementara menunggu hak milik dipindah kepada perayu apabila kesan sekatan tamat. Pemegang amanah terus tidak mempunyai kewajipan selain menyerahkan harta amanah kepada orang yang berhak.

Case(s) referred to:

Ang Tuan Hock v. Lim Keng Thean & Anor [2012] 1 LNS 962 CA ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

CC Siah Properties Sdn Bhd v. Ang Kheng Huat [2012] 1 LNS 1289 CA ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Dato' Yap Peng v. PP [1993] 2 CLJ 181 HC ***(refd)***

Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd [2007] 6 CLJ 538 CA ***(refd)***

Good View Property Sdn Bhd v. Standard Chartered Bank Malaysia Bhd [2014] 6 CLJ 965 CA ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] CLJ (Rep) 239 SC ***(refd)***

Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syed Kechik Syed Mohamed & Anor And Other Appeals [2000] 3 CLJ 797 CA ***(refd)***

Malaysian Assurance Alliance Bhd v. Anthony Kulanthai Marie Joseph [2011] 1 CLJ 15 FC ***(refd)***

PP v. Chee Kon Fatt [1991] 3 CLJ 2564; [1991] 3 CLJ (Rep) 513 HC ***(refd)***

PP v. Munusamy [1979] 1 LNS 78 FC ***(refd)***

Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 PC ***(refd)***

Seneviratne v. R [1936] 3 All ER 36 ***(refd)***

Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 73(1), 101, 114(g)

For the appellant - Wan Jawahir Harun; M/s Wan Jawahir & Takiyuddin
For the respondent - Hairulallias Shaari; M/s Saufi, Putra & Assocs

[Editor's note: Appeal from High Court, Kota Bharu; Civil Suit No: MT(2)22 - NCVC-35-02-2013 (overruled).]

Reported by Najib Tamby

JUDGMENT

Idrus Harun JCA:

Introduction

[1] The appellant brought an action against the respondent seeking *inter alia*, a declaration that a piece of land known as Lot 7002, PM 330 situated at Kg Cherang Ruku, Jajahan Pasir Puteh, Kelantan (the land) had been sold by the respondent to the appellant and that the land was held by the respondent as a bare trustee. The High Court dismissed the appellant's claim. The appellant appealed to this court. We allowed the appeal, stated that we would give our reasons in writing later and this we now do.

The Claim

[2] The material facts relating to the claim are clearly set out in the statement of claim to reveal at the outset that the respondent was the registered owner of the land which was previously described as Lot PT 5819, HS(M) 153, Kg Cherang Ruku, Mukim Cherang Ruku, Jajahan Pasir Puteh, Kelantan. The statement of claim next discloses that on 5 December 2001, the respondent sold the land to the appellant who made full payment for the purchase price to the respondent on the same day. However, the land was not transferred to the appellant immediately after the sale and purchase transaction as the same was subject to a restriction in interest which prohibited any transfer of ownership of the land for a period of ten years from the date the land title was issued. Thus at the time of the sale, both the appellant and the respondent agreed that when the said period of restriction expired and a final title was issued, the respondent would execute all the relevant documents to enable the land to be transferred to the appellant.

[3] For the purpose of the sale, the respondent executed a power of attorney (exh. P1) on the same date the land was sold giving the appellant full power to deal with the land. The respondent had also executed Form 14A (exh. P2) for the transfer of the land to the appellant and surrendered the original qualified land title (exh. P3) to the appellant. Since then, the land title had been in the appellant's custody.

[4] The respondent in fact did not occupy the land since 2001. When the restriction ceased to have effect in 2011, the appellant tried to trace the respondent to secure his signature on the relevant documents for the purpose of transferring the land to the appellant but to no avail. The appellant moreover, made an enquiry at the Land Office of the District of Pasir Puteh but was informed that the final title had already been issued in 2008 which title was collected by the respondent. A private caveat was consequently lodged on the register document of title in respect of the land by the appellant. However, the appellant was served with a notice for removal of the caveat *circa* February 2013 applied by the respondent as he intended to transfer the land to another person.

[5] The appellant further avers that after he had made the full payment for the purchase of the land and the respondent had executed the power of attorney in favour of the appellant, the respondent no longer had any right and was not entitled to the land. Accordingly, the respondent held the land as a bare trustee.

[6] In his claim, the appellant seeks a declaration that the land was sold by the respondent to the appellant and that the same was held by the respondent as a bare trustee. In addition, the appellant prays for an order that the caveat be extended, the respondent be restrained and prohibited from transferring, selling and disposing off the land and to execute such documents and make such application to enable the land to be transferred to the appellant. The appellant also claims for damages for loss of exclusive right over the land to be assessed and interest thereon.

The Defence

[7] The respondent denies selling the land to the appellant and he could not have done so as he did not know the appellant. He did not receive any payment from the appellant for the alleged sale, neither did he execute any power of attorney nor sign Form 14A. It was the respondent's belief that either the appellant had conspired to defraud the respondent or the appellant was defrauded by an irresponsible party. He further pleaded that his signature on the power of attorney was forged, the name of the donor was not his full name, he did not sign it before a Magistrate namely Wan Mohd Ludin bin Hj Ibrahim and the power of attorney was false, void and of no effect. As regards Form 14A, the respondent alleged that the name appearing therein was not his name and he did not sign the form before the Magistrate. The respondent therefore asserts that he was the lawful owner of the land, the appellant's caveat was entered in bad faith and seeks the removal of the same as he had sold the land to another person.

The High Court's Decision

[8] The learned trial judge found that the present case involved an application for the land to the State Authority by a staff of the Land Office of the District of Pasir Puteh namely Mohamad bin Yaacob (Che Mat), with the assistance of the Assistant District Officer who was also the Senior Assistant Land Administrator at the Land Office for the District of Pasir Puteh namely Wan Mohd Ludin bin Hj Ibrahim (PW1). The learned judge added that Che Mat was married to the respondent's aunt. As regards PW1, according to the learned judge, apart from his role as stated above, he also witnessed the execution of the power of attorney and Form 14A as the Second Class Magistrate. The learned trial judge, however, found that the respondent refused to release the land upon alienation even though the land was purchased by the appellant at the price of RM40,000. Insofar as the land title is concerned, it was His Lordship's finding that when the qualified title

was issued, the same was collected by Che Mat. On the other hand, when the final title was issued in 2008 by the Land Office, it was taken and kept by the respondent. This was followed by another finding by the learned judge that Che Mat and PW1 had committed deceitful act in the complot to sell the land which made use of the respondent's name in the application for the land from the State Authority and in expediting the execution of the power of attorney and Form 14A for the disposal of the land even though the period of ten years was way before it expired.

[9] The offer to sell the land, according to the learned judge, came from Che Mat and the sale and purchase transaction was also between the appellant and Che Mat. The learned judge, while stressing that the payment of the purchase price was made by the appellant to Che Mat, elaborated further by saying that the appellant did not deal with the respondent and even though the appellant admitted that the respondent was present, the payment was made to Che Mat who was not called to testify. Consequently, the appellant failed to prove his claim. The learned judge added that the appellant knew that the land was not sold by the respondent but by Che Mat and PW1. Therefore, the learned judge found that the appellant was not a *bona fide* purchaser.

Decision

[10] The dismissal of the appellant's claim was premised on the findings by the court of first instance that the appellant was not a *bona fide* purchaser and that he had conspired with PW1 and Che Mat to purchase the land. First and foremost, we would unhesitatingly say that the finding was perverse as it was not based on the respondent's pleaded case. We find that nowhere in the respondent's statement of defence was this issue raised and neither was the person by the name of Mohamad bin Yaacob or Che Mat mentioned therein. In any event, the respondent in his evidence never alleged that Che Mat, PW1 and the appellant had conspired or plotted to sell the land to the appellant, the fact that effectively drives the final nail in the coffin of the learned judge's findings.

[11] The appellant, in his witness statement, stated that Che Mat who admitted to him to be related to the respondent, was the broker who had offered to sell the land to him. He subsequently met the respondent and Che Mat at the office of PW1 at the Land Office where the respondent signed the power of attorney and Form 14A. Thereafter, the respondent handed over the qualified title (exh. P3) to the appellant. The appellant paid the purchase price of RM40,000 on the same day in the presence of PW1. This evidence was not challenged by the defence when learned counsel cross-examined the appellant. Neither did the defence suggest to the appellant nor PW1 that they had conspired or plotted with Che Mat to deceive the respondent.

[12] The finding by the learned judge therefore is patently incorrect and completely unsupported by any evidence that would show that PW1, Che Mat and the appellant had indeed plotted to deceive the respondent. We would in this regard say that His Lordship overlooked the fact that the respondent's defence was one of a mere denial. The respondent failed to prove his claim that he never sold the land to the appellant and that he did not know the appellant while in actual fact there was evidence to show that he executed the power of attorney and Form 14A before PW1 who attested the execution of these documents. The evidence of the appellant, supported by PW1's evidence, serves as a clear proof that the respondent signed these documents at the Land Office.

[13] The appellant's witness statement furthermore, showed that the respondent signed and thumbprinted the power of attorney and Form 14A respectively after the respondent had confirmed the sale and receipt of the payment for the sale. It is significant to mention that this evidence was not challenged by the defence at all. The court only has the respondent's words that his signature and thumbprint on the power of attorney and Form 14A were forged. The cross-examination of the appellant was conspicuously brief. At no time was it suggested to PW1 and the appellant that the respondent did not sign and affix his thumbprint on the power of attorney and Form 14A respectively. The allegation that these documents were forged was not supported by any other corroborative evidence. The learned judge committed a serious omission when His Lordship completely failed to direct his mind to this material evidence which clearly evinced the intention of both parties to enter into the transaction which intention they in fact carried out with the payment of the purchase price by the appellant to the respondent who in return delivered the qualified title to the appellant. There was therefore an agreement *albeit* orally, entered into between the respondent and the appellant to sell and purchase the land.

[14] In the face of the evidence of the appellant and PW1 which is supported by contemporaneous documentary proof, the respondent's allegation therefore cannot hold water and does not constitute sufficient proof to support his case of fraud and forgery. Learned counsel for the respondent in this regard contended that the appellant testified during cross-examination that "Che Mat sebagai orang yang menerima wang RM40,000 yang kononnya wang pembelian hartanah defendan". This contention is, in our judgment wholly erroneous as the appellant never testified to that effect. Instead, the appellant testified that he paid RM40,000 when Che Mat and the respondent were at the Land Office.

[15] On the whole, the decision of the High Court was based on facts which were not pleaded by the respondent nor supported by any evidence. We would mention at this point that the learned judge found that the application for the land was made by the staff of the Land Office and assisted

by PW1. However, PW1 was never cross-examined on this issue. Oddly enough, the respondent on the other hand, never said that his land application was assisted by PW1. His evidence was that Che Mat handled his land application. In any event, the respondent did not plead this fact in his statement of defence. In the absence of any pleading and evidence on this finding, it can safely be said that such finding was pure speculation and conjecture.

[16] The learned judge had also made the following finding:

> … apabila grant sementara keluar dan masih panas-panas terus diambil oleh Che Mat tersebut dan setelah grant kekal keluar pada tahun 2008 sempat Defendan mengambil miliknya oleh sebab Che Mat sudah mendapat wang.

This finding by the learned judge, is clearly unwarranted as it was not based on the respondent's pleaded case. Besides, the respondent did not testify in the sense the learned judge had found. The learned judge's finding that it was Che Mat who sold the land to the appellant is contrary to the appellant's evidence which showed that Che Mat was merely the broker who offered to sell the respondent's land to him. Furthermore, the unchallenged evidence of the appellant revealed that the payment for the purchase price and execution of the power of attorney as well as Form 14A were between the appellant and the respondent.

[17] The learned judge, quoting an excerpt from the Court of Appeal's decision in *Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538, that a supplicant who prayed in aid equitable assistance must himself be not guilty of equitable misconduct, stressed that the appellant who came to court in equity must come with clean hands. It would seem that His Lordship based his proposition on the following finding:

> Jika pihak Plaintif membeli tanah yang telah diketahui hanya 10 tahun boleh ditukar hakmilik dan tidak pula berurusan dengan tuanpunya dan hanya berurusan dengan Che Mat dan mengakui Defendan turut hadir tetapi bayaran dibuat kepada Che Mat tidak kepada Defendan dan Che Mat juga gagal dipanggil dan maka pihak Plaintif adalah gagal di dalam tuntutannya apabila datang ke Mahkamah ini cuba untuk menyatakan bahawa sekatan kerajaan boleh diubah dan diselewengkan jika berkomplot dengan SP1 dan seorang survey officer bernama Che Mat.

The above finding, as we have stated earlier in our judgment, is not supported by any evidence neither is it based on the respondent's pleaded case.

[18] Moreover, the learned judge in fact failed to consider the respondent's denial that he sold the land to the appellant but admitted to selling the same to another buyer one Muhamad Ezudden bin Ezani at the price of RM230,000. This admission, in truth, is the real reason why he denied selling the land to the appellant for RM40,000 approximately 11 years prior to the second sale in 2012. The subsequent buyer, as the respondent had

readily admitted in his witness statement, was in fact angry with the respondent and accused the respondent of cheating him as the title to the land could not be transferred to him in view of the caveat lodged by the appellant. Truly, the respondent is indeed the supplicant who earnestly begs for help from the court but unfortunately he comes to the court with his hands tainted. Therefore, the equitable maxim relied on by the learned judge, in our judgment, does not help the defence case and in fact does not operate to deny the appellant of what is due to him under the law. There is simply no evidence that would support His Lordship's above conclusion which is manifestly perverse.

[19] The respondent in his defence denied that he had signed the power of attorney and Form 14A. He claimed that his signature on the power of attorney was forged. However, the defence did not adduce any evidence to prove that the signature and the thumbprint on the power of attorney and Form 14A respectively were forged. In dealing with this issue, we would start off by stating the obvious that is, the onus is on the respondent to prove his assertion. This is the requirement under s. 101 of the Evidence Act 1950. In *CC Siah Properties Sdn Bhd v. Ang Kheng Huat* [2012] 1 LNS 1289; [2013] 3 MLRA 611, where the appellant alleged the signatures on the sale and purchase agreement were forged, the Court of Appeal held that the burden was on the appellant to prove such forgery. In *Good View Property Sdn Bhd v. Standard Chartered Bank Malaysia Bhd* [2014] 6 CLJ 965, it was held that the burden of proving fraud was on the party alleging it.

[20] The appellant in the present action had led evidence through PW1 who testified that he witnessed the execution of the power of attorney and Form 14A by the respondent. The appellant too testified that the respondent executed these documents at the Land Office. It is in evidence that one of PW1's duties at the Land Office was to witness signatures and thumbprints on relevant documents. PW1 confirmed that the respondent signed the power of attorney and affixed his thumbprint on Form 14A on 5 December 2001. The respondent signed the power of attorney as the donor while the appellant was made the donee. As regards Form 14A, the respondent affixed his thumbprint thereon as the transferor. This evidence was completely unchallenged. The learned judge had clearly omitted to consider this crucial evidence. In the absence of any further evidence that could corroborate the respondent's evidence of the alleged forgery, we hold that his evidence has failed to dislodge the testimony of PW1 and the appellant on this point. Under the circumstances, the evidence of the respondent on the alleged forgery is devoid of any merits therefore must be rejected.

[21] Learned counsel for the respondent contended that the appellant failed to call Che Mat to testify. The learned judge in his judgment in this regard had also alluded to the failure on the part of the appellant to call Che Mat.

His Lordship had also found that Che Mat was married to the respondent's aunt. It is an irrefutable fact that the appellant mentioned about Che Mat in his evidence stating that Che Mat was the broker who offered to sell the land to him.

[22] However, the respondent, in his witness statement as well as during cross-examination, claimed that it was Che Mat who handled his application for the land adding that after the qualified title was issued, it was kept by Che Mat. He also said that Che Mat knew that the land was alienated to him and during cross-examination, the respondent claimed that it was Che Mat who sold the land to the respondent. It is significant point to mention that the respondent, for the umpteenth time had adduced evidence on matters which he did not plead in the first place. Nevertheless, in our judgment, taking into account the respondent's evidence that Che Mat was related to him and on the role he allegedly played, the respondent should have called Che Mat as his witness. Failure to do so would, in our judgment, attract the adverse inference under s. 114 illustration (g) of the Evidence Act 1950 against the respondent.

[23] It is a fundamental tenet of the rule of law that whoever alleges facts must produce the necessary evidence in proof of such facts (*Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627). The court may presume that evidence which could be produced and is not produced would if produced be unfavourable to the person who withholds it. Edgar Joseph Jr in *PP v. Chee Kon Fatt* [1991] 3 CLJ 2564; [1991] 3 CLJ (Rep) 513, while dealing with the issue of adverse inference under s. 114 illustration (g) of the Evidence Act 1950, referred to the Privy Council case of *Seneviratne v. R* [1936] 3 All ER 36 where Lord Roche said:

> Witnesses essential to the unfolding of the narrative upon which the prosecution case is based must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the prosecutions.

We need only say on this aspect that the respondent's failure to call Che Mat to testify would attract an adverse inference under s. 114 illustration (g) of the Evidence Act 1950 that evidence which could have been produced through Che Mat but was not produced, would if produced, be unfavourable to the respondent.

[24] We sifted through the evidence of PW1 and the appellant as well as the documentary evidence tendered by the appellant. The signature of the respondent on the power of attorney and his thumbprint on Form 14A were witnessed by PW1 and the appellant confirmed that the respondent executed these documentary exhibits at the Land Office. The particulars in the respondent's identity card are similar to the particulars which appeared in the

power of attorney and Form 14A. The appellant's evidence showed that the original qualified title (exh. P3) was in his possession since the execution of the power of attorney and Form 14A. In his witness statement, the appellant stated that the respondent handed over the said qualified title to him at the Land Office. The respondent did not challenge this evidence. Neither did the respondent challenge the appellant's evidence during cross-examination that he paid the purchase price at the Land Office in the presence of both Che Mat and the respondent. We are thus satisfied that the execution of the power of attorney and Form 14A by the respondent which was witnessed by PW1 and the payment of the purchase price by the appellant to the respondent clearly established that the sale and purchase transaction in respect of the land had in fact taken place.

[25] Further proof which showed that the land was sold to the appellant is the evidence that since 2001 it was the appellant who occupied, and paid quit rent for the land. This evidence was not disputed by the respondent. In fact, the respondent only paid the quit rent for 2013 when he intended to transfer the land to the new purchaser (exh. P5). Having read the grounds of judgment of the learned judge, we find that His Lordship failed to make a critical evaluation of the evidence. Had the learned judge done so, His Lordship could not have found that Che Mat, PW1 and the appellant had indeed plotted to deceive the respondent. The learned judge had obviously failed to direct his mind to and carefully appraise this evidence before coming to the conclusion as he did.

[26] As regards Form 14A, the respondent affixed his thumbprint thereon as the transferor. PW1 in his testimony had also explained that the qualified title (exh. P3) had a restriction that the land could not be transferred within ten years from the date the title was issued on 22 November 2001. However, despite such restriction, PW1 emphasised that there had been many cases where landowners who faced financial difficulties would sell their lands before the expiry of the ten year period even though they knew that the transfer of title could not be affected. Thus, what the landowners would do as a matter of practice was to execute Form 14A as proof of sale of the land but the said Form 14A could not be registered. PW1 therefore did not prevent both the appellant and the respondent from signing Form 14A when both of them agreed to enter into the sale and purchase transaction. PW1 further testified that he would not attest the execution of the power of attorney and Form 14A if the respondent was not present. He was very sure that since he had attested the execution of both documents, the respondent was present before him. He stressed that it never happened that the owner who wanted to transfer his title to the land was not present before him.

[27] The appellant in his evidence told the court that at the time he was offered to buy the land for RM40,000, nobody was interested to buy it as the same was covered with nipah palms. Moreover, the respondent wanted

cash payment for the sale of the land and the title had the restriction as aforementioned imposed thereon. The appellant however, agreed to purchase the land for the price of RM40,000 on the condition that the respondent execute the power of attorney and Form 14A in his favour and deliver the land title to him. The respondent agreed to the appellant's conditions and in fact upon payment of the purchase price, the respondent thereupon executed both documents and delivered the land title to the appellant. The whole transaction, as we have found earlier, was witnessed by PW1. The appellant also testified that apart from the land title, the respondent had also given to the appellant a copy of his identity card.

[28] It is to be noted that the appellant did not write his name in Form 14A. The appellant, however, clarified that he was told by PW1 not to do so since the title could not be transferred as yet. Evidence was also led to show that after the sale, the respondent never occupied nor took care of the land. The quit rent was paid by the appellant. After the restriction had lapsed, the appellant went to the Land Office to enquire about the final title but only to be told that the final title was issued in 2008 and was collected by the respondent. The appellant made several attempts to trace the respondent but in vain. As such the appellant lodged the caveat against the land.

[29] Notwithstanding the above evidence, the learned judge found that the power of attorney and Form 14A were not executed by the respondent before PW1 merely because there was a mistake in the spelling of the name of the respondent when the name 'ADIB' was omitted and as such the name which appeared in these documentary exhibits was not that of the respondent. This finding had driven the learned judge to make a further finding that Che Mat and PW1 had committed fraud in the complot to sell the land which made use of the respondent's name in the application for the land from the State Authority and in expediting the execution of the power of attorney and Form 14A for the disposal of the land even though the period of ten years was way before it expired. We pause here to observe that the learned judge obviously did not consider the evidence highlighted above or the identity card number written on both documents which clearly belonged to the respondent. The address of the respondent was also correctly stated on both documents.

[30] We have also undertaken a comparative visual examination of the respondent's signature in the power of attorney with his signature in his witness statement and found significant and material similarities which are both apparent and obvious to the naked eye. We are of the opinion that this court is perfectly entitled to embark upon this mode of comparative examination as provided by s. 73(1) of the Evidence Act 1950 which reads as follows:

A Comparison of signature, writing or seal with other admitted or proved

73. (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to be the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

[31] PW1 in his witness statement was honest enough to have admitted that he did not realise about the omission at the material time. However he was certain that the name of the owner which appeared on the land title, and both the power of attorney and Form 14A belonged to the person who executed both documents based on the identity card number of the respondent. We are satisfied that even though the name 'ADIB' was omitted from the respondent's full name, the omission is not fatal as the simple and naked facts relating to the identity card number, the address and the signature stated in the power of attorney and Form 14A clearly showed that the same indeed belonged to the respondent. We are thus convinced that the name appearing in these documents belonged to the respondent and that these documents were in fact executed by the respondent.

[32] Learned counsel for the respondent drew our attention to the fact that the power of attorney was signed by the respondent but for Form 14A, he only affixed his thumbprint adding that if the respondent could sign the power of attorney surely he could also sign Form 14A. He therefore contended that the respondent did not sign both documents and consequently alleged forgery and fraud. It is of some significance to observe that PW1 in his witness statement on this point and evidence during re-examination explained that it was the practice of the Land Office that for the purpose of execution of any Form 14A, a thumbprint of the owner would be obtained. This evidence is not disputed by the respondent when PW1 was not challenged on this crucial aspect of his evidence, and such failure in our judgment, implies acceptance of his evidence. Therefore the respondent's evidence that he did not sign the power of attorney and affix his thumbprint on Form 14A could not be true as such must be rejected.

[33] Based on the foregoing reasons, from the year 2001 when the land was sold to the appellant, the respondent held the land as a bare trustee while waiting for the title to be transferred to the appellant when the restriction ceased to have effect. There is overwhelming evidence to support this conclusion and such evidence we find, begins with the conduct of the respondent since 2001 in surrendering the land title to the appellant, executing the power of attorney and Form 14A, accepting the full payment of RM40,000 from the appellant and paying the quit rent only for the year 2013. It is next followed by the evidence that the land was occupied by the

appellant who, save for the year 2013, also paid the quit rent for the land. This evidence, when considered cumulatively, would therefore show that the respondent had given up possession and ownership of the land and held the same as a bare trustee.

[34] We are thus reminded that in law, a bare trustee has no obligation except to hand over the trust property to the person entitled to it (*Malaysian Assurance Alliance Bhd v. Anthony Kulanthai Marie Joseph* [2011] 1 CLJ 15). The sale and purchase transaction between the appellant and respondent in our judgment constitutes a valid binding contract. There was clearly evidence that the respondent was paid. Therefore the vendor namely the respondent was a bare trustee. The law is clear. The vendor, after the receipt of the full purchase price and surrender of possession of the land to the appellant, is a bare trustee for the appellant and it must consequently follow, as night must day, that the vendor has no interest in the land which can be the subject matter of a caveat. It is also an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser and in the action before us, the appellant, who becomes the equitable owner, the vendor, who is the respondent, having a right to the purchase money for which he has a lien on the land. When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser (*Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45, upheld by the Privy Council *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135; *Yeong Ah Chee v. Lee Chong Hai & Anor and 13 Other Appeals* [1994] 3 CLJ 20 SC).

[35] Our careful and critical appreciation of the evidence of the respondent has exposed the series of failures to put and suggest to PW1 and the appellant on the material and crucial aspects of the defence and the trail of evidence not highlighted in, or supported by, averments in the pleadings which is exacerbated by the findings made by the learned judge drawing on facts which are completely not pleaded by the respondent nor supported by any evidence. On the failure to cross-examine PW1 and the respondent on such material and crucial aspects of the defence case, as we have highlighted earlier in this judgment, there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness testimony and goes to the credibility of the respondent's testimony (*Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 FC). We are thus compelled to surmise, in the absence of any challenge of the evidence of the appellant and PW1 elicited in the course of the trial including their witness statements relating to the execution of the contemporaneous documents *viz*, the power of attorney and Form 14A and the sale and purchase transaction in respect of the land, that such failure amounts to an acceptance of this crucial evidence.

[36] Further, it is trite and established principle that the court is not entitled to decide a suit on a matter which is not pleaded and that parties cannot adduce evidence in support of unpleaded facts. The trial of the suit is confined to pleadings and parties are bound by their own pleadings. In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] CLJ (Rep) 239; [1991] 1 MLJ 428, the Supreme Court held that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal. This general principle has found favour with a plethora of local cases such as *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615; *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & 6 Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185; *Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syed Kechik Syed Mohamed & Anor And Other Appeals* [2000] 3 CLJ 797; [2000] 3 MLJ 328; *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152 (see also *Malaysian Court Practice*, 2007 Desk Edition, Lexis Nexis).

[37] The court tends to lean against allowing issues not pleaded in the pleadings. In the absence of any pleading on the findings by the learned judge that the appellant was not a *bona fide* purchaser, that he had conspired with PW1 and Che Mat to purchase the land and that Che Mat had obtained the money from the appellant, it would be manifestly unjust and wrong for the learned judge to make such findings and for the respondent to succeed before us. It would be a salutary reminder that it is not the function of the court to make out a case or provide a relief which is not adverted to in the pleadings. The trial of the suit should be confined to the pleas on which the parties were at variance. His Lordship had misconstrued the evidence and drawn the wrong conclusion that there was a web of deceit and fraud to sell the land to the appellant when he allegedly conspired with PW1 and Che Mat to defraud the respondent and therefore the appellant was not the *bona fide* purchaser. His Lordship's conclusion is undoubtedly against the weight of evidence and manifestly erroneous.

[38] The case, we must say, was decided on the findings of facts made by the learned judge. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the court below be disturbed by the appellate court unless it appears that those findings are clearly wrong (*China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163). To reiterate further, this court will lean in favour of appellate intervention if it can be shown that such findings suffer from some serious errors, or are against the weight of evidence or unless we can find substantial or compelling reasons for disagreeing with that findings (*Dato' Yap Peng v. PP* [1993] 2 CLJ 181; [1993] 1 MLJ 337; *PP v. Munusamy* [1979] 1 LNS 78; [1980] 2 MLJ 133). Reference in this connection is also

made to the case of *Ang Tuan Hock v. Lim Keng Thean & Anor* [2012] 1 LNS 962; [2014] 2 MLJ 109 wherein this view has been reaffirmed by this court and we quote the relevant excerpt:

> … In *Kerry v. Carter* [1969] 1 WLR 1372 at 1376, Lord Denning MR held that the Court of Appeal will interfere 'where the judge has gone wrong on principle or is shown to have misapprehended the facts; but even if neither is shown, we will interfere if we are of opinion that the judge was clearly wrong'. *Kerry v. Carter* was followed by His Lordship Jeffrey Tan FCJ recently when delivering the judgment of the Court of Appeal in *Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors and Other Appeals* [2013] 2 MLJ 174.

In our judgment, the present appeal is one which clearly falls within the class of cases where appellate intervention by this court is warranted. There was indeed no proper and correct judicial appreciation of evidence which is explicitly characterised by the obvious failure on the part of the learned judge in considering every piece of material evidence adduced before His Lordship. For this reason, we cannot help but find that the learned judge had fallen into error in misapprehending the law and evidence in concluding that the appellant failed to prove his case against the respondent.

Conclusion

[39] While the judgment of the learned judge is entitled to utmost respect, we however find valid justification for the reasons we have alluded, to disturb His Lordship's findings given the factual scenario of this case which in our judgment, is sufficient to support our inexorable conclusion that the appellant has on the balance of probabilities successfully proved his case against the respondent. We therefore unanimously allow the appellant's appeal with costs of RM15,000 here and below to be paid by the respondent to the appellant and set aside the order of the High Court dated 10 December 2014. The appellant's claim in prayer 24(a) to (j) is allowed. The deposit shall be refunded to the appellant.